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The Ethical Path: The True Significance of Saenz versus Roe and the Establishment of the Right to Travel

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THE ETHICAL PATH

The True Significance of Saenz v. Roe and the Establishment of the Right to Travel.

One of the major "rights" that the American people take for granted is the so-called "right to travel" which ensures equal treatment across state lines regardless of whether you are a native of a state or a visitor. The word "travel" is not mentioned once in the Constitution. This changed in 1999 with the case of *Saenz vs. Roe*, where the majority opinion plainly states that while the right to travel is never explicitly mentioned in the Constitution, it is "firmly embedded in our jurisprudence."[1] Saenz v. Roe is an incredibly complex case that could have been tried in quite a few different ways. One of the primary reasons for this lies in the background of the case itself, starting with the origins of the actual lawsuit. The plaintiff, Saenz, is a representative of three different women who had all moved to the state of California to escape abusive household situations from three separate states. The suit was filed because the State of California denied [the women of the Saenz case] financial assistance provided through the Temporary Assistance for Needy Families (TANF) program of the Personal Responsibility and Work Opportunity Act (PRWORA) signed into law by President Clinton in 1988. This act had a clause allowing states to decide whether or not to require any person to have lived in the state for a year or more to be eligible for financial assistance. Saenz claimed that by electing to enforce this clause, California was violating the Privileges and Immunities Clause of the 14th Amendment.

In the forming of the majority opinion of Saenz vs. Roe, Justice Stevens focused heavily on the right to travel as it pertained to movement between states and equal treatment, however in this process, he paid less heed to the historical context that made enforcing the right to travel so complex. His primary flaw is seemingly ignoring the issue of which states and entities hold responsibility over specific needy groups given that all citizens should be treated equally across all state lines. In trying the case on these grounds, Stevens and the other justices disregard

[1] "Saenz v. Roe, 526 U.S. 489 (1999)," Justia Law, accessed December 10, 2020, https://supreme.justia.com/cases/federal/us/526/489/)

historical contexts on the foundation of the case itself (the ability for a state to deny welfare benefits to those considered an outsider), that would have supported the actions taken by California. By diving into these contextual details, an analysis can be developed of how in ignoring these contexts, Stevens was able to legally move the United States forward and establish a new welfare responsibility for the federal government.[2]

I

The ability of a state to deny privileges to certain portions of the population is not a new occurrence. In fact the practice can be traced back as far as the late 18th century in post-colonial America. In an effort to assuage the responsibility for the poor, many states partook in the practice known as "warning out." Warning out was the act of shirking responsibility for providing financial support for a group of people, commonly migrants and the poor, by not allowing those who had been warned out to "vote, hold office, and pay taxes"[3]. Such legal strangers were also ineligible for financial assistance. On a baseline level, the benefit of warning out from the perspective of the local governments is the ability to effectively ignore any migrants who moved into their jurisdiction and were viewed as needy or likely to become needy in the future.

Digging even deeper into the colonial context surrounding the practice there are several arguments that can be made to show warning out and all of the history surrounding the warning out supporting a similar verdict to the one made by the Supreme Court. Primary among these arguments is the reason the practice of warning out was truly established. While warning out is a practice enforced by local governments to prevent having to shoulder the burden of supporting

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[2] "Saenz v. Roe, 526 U.S. 489 (1999)," Justia Law,accessed December 10, 2020, https://supreme.justia.com/cases/federal/us/526/489/)

[3] Gary Nash, The Urban Crucible (1979), 185

indigent migrants, the core reason behind this is not as broadly applicable as its usage would seem. Warning out can be traced back to the Indian War of 1675, and the influx of refugees fleeing into Massachusetts as a result of the fighting therein, thus it is reasonable to argue that warning out is only necessary in response to surges in migration caused by conflicts such as wars. This supports the fact that again according to Gary Nash, the number of people who were warned out rose leading up to the Seven Years War, "... in the years just before the outbreak of the Seven Years War --181 in 1753, 176 in 1754, and 222 in 1755"[4] So given that warning out originated from and was at its peak around times of war, there isn't a logical thread to justify using it to deny the ability of a poor person to move from location to location seeking better fortunes.

The second argument supporting the *Saenz v. Roe* decision can be found in the legal actions taken by the state of Massachusetts with regard to the practice of denying welfare benefits and politically isolating the poor . While there was not a regional court case challenging the validity of warning out, there was an act passed in 1789 that is recorded in the legal documents of the State of Massachusetts, as documented by Morning Star, which repealed all other acts pertaining to "the support, employment, binding, warning out, or removal of poor."[5]

With this established it is extremely interesting to analyze the significance of the parallels between "warning out" and *Saenz v. Roe*. At the time, warning out was an established practice that was used frequently to the tune of "from 1721-1742... 25 persons per year" according to

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[4] Gary B. Nash, *The Urban Crucible: Social Change, Political Consciousness, and the Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1979), 186

[5] "Legislative Acts/Legal Proceedings." *Morning Star*, vol. I, no. 1, 8 Apr. 1794, *Readex: America's Historical Newspapers*, infoweb.newsbank.com/apps/readex/doc?p=EANX&docref=image/v2%3A10C1C8C25D637FA0%40EANX-10C27B76A1AAC258%402376403-10C27B76B4E53E98%400-10C27B7749B13B50%40Legislative%2BActs%252FLegal%2BProceedings.

Gary Nash, however, this precedent is not something that Justice Stevens and the other justices who tried *Saenz v. Roe* took into consideration when settling on the verdict. There may be a reason for that. In fact, in his discussion of warning out in *The Urban Crucible: Social Change Political Consciousness, and the Origins of the American Revolution,* historian Gary Nash goes into great depth as to the overuse of warning out and the harm that it caused. Nash explains that it was not only certain communities that were practicing warning out during the 18th century, in Massachusetts the practice created a type of people he deems the "strolling poor" poor people who had left their community in search of a better life only to be kept constantly on the move because "each community warning out migrants from neighboring communities," ultimately leading to heightened misfortune of those who chose to leave their homes. In a much subtler way, this also parallels the situation that Saenz and the other plaintiffs faced, they had left their home states seeking a better life outside of their abusive home situations, only to be warned out from financial benefits by TANF and California. [6]

II

The core question behind *Saenz v. Roe*, the question of who is responsible for supporting the indigent is not exclusively applicable to migrants, in fact one of the most significant debates surrounding this question is tied to another heated topic of post-Revolutionary America, the abolition of slavery. Not only was there the heated debate as to the place of black people in the new American society and the future of slavery, but even in the Northern states that had settled to abolish slavery there was hesitance. Much of the fear that the Northern states held with regards to abolishing slavery within their borders stems from the fact that abolishing slavery would lead to a sudden influx of destitute black people into society, specifically the elderly

[6] Gary B. Nash, *The Urban Crucible: Social Change, Political Consciousness, and the Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1979), 186

Blacks. Previously, the elderly African-Americans had been the financial responsibility of the slaveholder, if slavery were to be abolished the elderly would suddenly be the responsibility of the state and local governments, putting more financial pressure on the governments. Therein lies the problem, in electing to do what is an ethically good thing, the Northern states find themselves wondering what they can do in order to determine where the responsibility lies for supporting these newly freed slaves.

At the core of every argument about the rights of freed slaves, is the question of citizenship; one that plays a very important role in analyzing the arguments made for and against the abolition of slavery. An argument that can be made to counter the fear of the influx of destitute African- Americans is that the responsibility of the states is only the responsibility to care for the citizens of their state, and that they have no obligation to provide equal opportunity for those who do not qualify as citizens. At the time of the abolition debates in New York, it was the late 18th and early 19th centuries, well before the Civil War and the 13th through 15th amendments provided insurance of birthright citizenship and equal protection. However, this is essentially the very same argument that the state of California was making by enforcing the citizenship requirement of the Temporary Aid for Needy Families program, by requiring that an eligible person have lived in California for a year to qualify. California is saying that even though one lives in the state of California and has chosen to make this state their home but, because they don't meet requirements the state is not entitled to do anything for them. This is a problematic argument to make legally because one does not become an official citizen until they reach their 18th birthday according to the USCIS naturalization fact sheet. By the same logic states can deny children legal and financial assistance on the grounds of a child being too young to classify as a citizen. This further complicated the debate surrounding abolition because it

required that some provision be made to ensure freed slaves were treated as citizens even though the Constitution did not directly make them such at the time.

There is one underlying issue with the context of abolition, one that proves Justice Stevens' decision to move the precedent forward instead of focusing on the past. The underlying racial bias that feeds through all of the issues with regards to abolition. While the financial grounds previously analyzed are a logical line of thinking, there is also the issue that many white people did not view African Americans as worthy of being given equal footing in society. In his book *Emancipating New York: The Politics of Slavery and Freedom 1777-1827,* Dr. David Gellman explores the concept that part of this inferior view of African Americans was due to their struggles to utilize language as easily as white people did. To an affluent, educated white man a black man speaking in broken English was not well educated enough to properly participate in civil discourse, and, as such, should not be treated equally to the white man. Because the white man did not make an effort to educate the black man to allow for proper participation in society, Gellman states, "even when African- Americans appeared to measure up to the standards of Anglo-American linguistic ability, whites degraded them for it. … 'people amused themselves by getting him to perform spontaneously… this seemed to me to be a cruel and thoughtless sort of diversion.'" [7]

Regardless of the fact that racism still exists in America, it had been legally abolished well before 1999, when the Saenz case was heard. The 13th and 14th amendments formally ended slavery in the late 19th century. In the mid-late 20th century the Civil Rights act finally ruled that African- Americans are entitled to the same legal treatment as any other American. It is the "privileges and immunities" clause of the 14th amendment, which states "the citizens of

[7] David Gellman, *Emancipating New York* (Baton Rouge: Louisiana State University Press, 2008), 110-111

each state shall be entitled to all privileges and immunities of several states," upon which Justice Stevens based his argument in *Saenz v. Roe*. This, partnered with the establishment of birthright citizenship, that anyone born in the United States is a citizen of the United States, meant that in trying the Saenz case any decision that Stevens made could be broadly extended to determining the breadth of the "right to travel." Thus if Stevens elected to consider the history surrounding abolition and the financial burden of the impoverished African-Americans, which was established to have been partially based in racism and racial biases, into his decision he would be validating the opinion that African-Americans were unworthy of treatment equal to that of other citizens. Instead of honoring this, Stevens, whether knowingly or not, recognized that American society of 1999 was not the same as the post- colonial American society which was clearly more explicitly racist. By focusing on codifying the "right to travel" something previously only implied by the wording of the privileges and immunities clause, he expanded the duties of the states to caring for all people, regardless of race or wealth.

III

The most surprising pieces of history to exclude from the Saenz decision was the struggle of the women of post-Colonial America. This is a two pronged issue. The first pertaining to the treatment of mothers. As was previously discussed, issues with welfare are connected to the impacts of war and conflict on those in the countries involved in conflict. In post-Colonial America, due to the extremely limited definition of who was considered a citizen of the United States, women as well as the previously discussed African-Americans were left out of that definition. This was highly problematic because with their husbands fighting in the war, women were required to provide for their families, but as they were not considered citizens, they were not entitled to the welfare benefits provided by the state and federal governments. In *Ebb Tide in*

New England: women, seaports, and social change, historian Elaine Foreman-Crane makes the important point that, while women at this time were able to work jobs and provide for their families, they were subject to the "time constraints of wives and mothers. Women far more often than men earned income on an irregular and seasonal basis." Without the benefits of welfare, this left many women whose significant others fought in the war in an extremely vulnerable financial position.[8]

It was not only the married women who were impacted by the lack of welfare benefits, it was also the widowed. A side effect of not being considered citizens was the fact that women were not allowed to participate in political discourse, and women were also not allowed to hold land. The law did allow for widows to inherit the financial capital of their late husbands and for them to work a job, but it was also extremely common for women to become financially dependent upon their husbands. Thus with the deaths of their husbands many widows are left with only their inherited funds and limited access to job opportunities which would make it difficult forthem to provide for themselves. Even worse, in 1692 a law was passed that made it where widows could no longer easily flip their estates in order to game the financial cushion necessary to properly care for their families, as well as requiring that the debts of their husbands be taken off of the top of their inheritances, Foreman-Crane writes "the 1692 law… enhanced creditors rights at the expense of the widows...debts came off the top... "[9] The question then became, if the law is making it more difficult for widows to stay financially afloat, and women are not considered citizens, who is responsible for the welfare of these disenfranchised women? The clear answer seemed to be that the women were left responsible for their own fates.

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[8] Elaine Forman. Crane, *Ebb Tide in New England: Women, Seaports, and Social Change, 1630-1800* (Boston (Mass.): Northeastern University Press, 1998), 38

[9] Elaine Forman Crane, Ebb Tide, 158

Justice Stevens thought differently in his opinion in *Saenz v. Roe.* Though he does not explicitly mention the struggles of women in the late-18th century, the interpretation of the privileges and immunities clause within his majority opinion turns this history on its head. In establishing that the "right to travel" is a right guaranteed to all citizens of the United States, Stevens established that it was the responsibility of the states to provide for their citizens as well as the citizens of other states who may be visiting. Thus the establishment of the "right to travel" makes laws such as the 1692 act difficult to enforce as now the states have become required to provide for the widows and other women who, because of birthright citizenship, are considered citizens. Stevens, trying the case in 1999, realized that the United States was no longer a county where only white, property holding men were considered citizens. Seeing this he tried the case on grounds that it would do the greatest good for the most people and moved the United States forward with that decision, closer to the country where all men, and women, are created equal.

IV

There is a very distinct bent to the ruling in *Saenz v. Roe*. Justice Stevens' decision is at its core an ethical argument, not a legal one.. The one major group of court cases cited was the Slaughterhouse Cases. According to historian Eric Foner, the court's decision in these cases established that the Privileges and Immunities Clause applied to "only those rights that derived from national, not state citizenship."[10] The broad applicability of this precedent was merely in allowing for the courts to establish the fact that they have the right to rule on the Privileges and Immunities clause. One of the interesting pieces to realize with this is that the lack of extreme reliance on precedent means that, in fact, Justice Stevens was relying heavily on ethics to reinforce his argument. The ethical concept behind Stevens' argument is twofold: 1) that it is the

[10] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York, NY: W. W. Norton & Company, 2020), 134

responsibility of the fortunate/ the powerful to look after the less fortunate; 2) the United States is a unified whole, not just fifty individual states. The first point is reminiscent of the famous "Model of Christian Charity" speech by John Winthrop, in which he said "that every man might have need of others, and from hence they might be all knit more nearly together in the bonds of brotherly affection."[11] The implication of this being that all men hold a responsibility to care for their fellow man as they are reliant on one another to survive, and the ethics that underlie that argument and the glue that binds together Justice Stevens' argument in *Saenz v. Roe*. Stevens recognized that the actions of California undermined the principle of the powerful caring for the powerless, as did all of the history previously discussed throughout the course of this paper, and in this recognition made a decision that above all ensured that all people regardless of where they lived, there race, gender, or creed would be able to live without fear of having necessary welfare denied them

The ideological core of the Stevens' ethical argument established the emotional core is t that the United States is to quote the Pledge of Allegiance "one nation under God" and that with any one state given the power to deny privileges to that should be provided by the Constitution, it shows a lack of unity within United States that could lead to unrest among the states. Acknowledging this risk, Stevens laid heavy emphasis on how the freedom of movement between states promoted by the "right to travel" made the country seem more unified and whole reinforcing the social and economic interdependence of the United States, which wraps back to the Slaughterhouse cases and the ultimate decision that national citizens were entitled to the same treatment of every state. This is something that has long been believed to be guaranteed to

[11] John Winthrop, "A Model of Christian Charity," Teaching American History, accessed December 09, 2020, https://teachingamericanhistory.org/library/document/a-model-of-christian-charity-2/

the people of the United States, but was not established until Justice Stevens made the decision to rule that even though the word "travel" is never mentioned in the Constitution it is in fact "firmly embedded in our jurisprudence."

On the surface, *Saenz v. Roe* is not an exceedingly difficult case to understand. At the time the case was being tried, it was only mentioned in passing in the press, the New York Times article on it being found on page 18. However, even then the Times, like myself, realized the great future significance that the case could hold stating "the debate today was over welfare policy...but the deeper issue was the meaning of citizenship.[12]" Prior to my research, the most intriguing piece of this case to me was the fact that I did not know that it wasn't until 1999 that my equal treatment across state lines was guaranteed. I sought to discover the reason something so ingrained in the culture of the United States had taken so long to become incorporated. I quickly discovered the fact that this was not the most significant piece of the puzzle as to the lasting impact of *Saenz v. Roe*. The reason the "right to travel" was not incorporated for so long is primarily due the fact that it does not exist constitutionally. It exists in a gray area, in between the enumerated rights clearly outlined in the Constitution and those implied rights that weren't explicitly mentioned but were clearly derived from the Constitution and its amendments, unlike these other rights the "right to travel" is not clearly developed by the Constitution. Legally this makes it extremely difficult to try at the level of the Supreme Court because their responsibility is to try all cases on the grounds of Constitutionality, and with no grounds in the Constitution the right becomes difficult to incorporate.

[12] Linda Greenhouse, "Supreme Court Hears Welfare Case," The New York Times, January 14, 1999, accessed December 09, 2020, https://www.nytimes.com/1999/01/14/us/supreme-court-hears-welfare-case.html

I came to the realization that the real intrigue in this case came not from the facts that were included, but from those that were not. In digging into the history of the case, and some of the precedents that were not acknowledged in the majority opinion. As I found more and more history, I found out exactly why Stevens wrote the majority opinion as he did. *Saenz v. Roe*, and more broadly the right to travel was a case that involved each and every aspect of the 14th amendment. The 14th amendment provides birthright citizenship, anyone born in the USA is a citizen of the USA. This is on trial in *Saenz v. Roe* because California was trying to treat the plaintiffs differently from other citizens. The 14th amendment also guarantees that all citizens are treated equally all throughout the United States, at trial in the Saenz case for the same reason. Stevens was therefore able to try the case on the grounds of welfare and the Privileges and Immunities clause, while using the grounds of the 14th amendment to establish the right to travel. Without histories such as those I discussed in this essay, the "right to travel" would have remained in quotations never seen as something that needed to be put into law. The existence of histories that show unequal treatment of people in need of assistance, coupled with the circumstances of *Saenz v. Roe*, and a justice seeking to make a difference allowed for the "right to travel" becoming the right to travel.

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